

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 228,037

ORDER

The respondent and its insurance fund appealed the Award dated May 10, 1999, entered by Administrative Law Judge Bryce D. Benedict.

APPEARANCES

Beth Regier Foerster of Topeka, Kansas, appeared for the claimant. Scott M. Gates of Topeka, Kansas, appeared for the respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a September 22, 1997 accident. After adopting the opinions of Dr. Peter Bieri, whom the Judge selected to perform an independent medical evaluation, and after finding that claimant injured both her left ankle and back as a result of the September 1997 accident, the Judge awarded claimant a nine percent permanent partial general disability.

The respondent and its insurance fund contend that Judge Benedict erred. They argue that claimant mentioned having back pain to Dr. Daniel T. Hinkin, her treating physician, on only one occasion. Therefore, they argue claimant has failed to prove that she either injured her back when she broke her ankle and fell in September 1997 or later permanently aggravated it by walking with an altered gait. In the alternative, they contend that the Judge erred by failing to reduce the award by the amount of preexisting impairment.

They argue that claimant's award should be limited to either a 12 percent permanent partial disability to the left lower extremity or, if claimant did permanently injure or aggravate her back, to an eight percent permanent partial general disability.

Conversely, claimant requests the Appeals Board to affirm the Award.

The only issue before the Board on this appeal is the nature and extent of injury and disability that claimant sustained as a result of the work-related accident.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On September 22, 1997, Ms. Morgan fell after slipping on the curb of a sidewalk. The accident fractured Ms. Morgan's left ankle and hurt her lower back. The parties agreed the accident arose out of and in the course of her employment with Kansas State University.
2. The left ankle injury has required two surgeries to date. Dr. Hinkin saw Ms. Morgan in the hospital emergency room on the date of the accident and operated on her ankle that same day. In that surgery, the doctor opened the fractured fibula, repositioned it, and inserted a plate and screws to hold it in place. Dr. Hinkin performed a second surgery on the ankle on December 16, 1998. On that date, the doctor did an arthroscopy to debride impinged tissue.
3. When Ms. Morgan testified in March 1999, she was experiencing swelling in her ankle almost daily and using her crutches approximately twice a week. Because of her ankle swelling, Ms. Morgan limps. And when she limps, which is most of the time, her back hurts. The Appeals Board finds and concludes that Ms. Morgan injured and aggravated both her left ankle and her back as a direct result of the September 1997 accident.
4. Before the September 1997 accident, Ms. Morgan had minor back symptoms, which were relieved by taking aspirin or Tylenol. Before the accident, she had not seen a doctor for those back symptoms and she had never been given any type of restrictions or limitations.
5. Judge Benedict selected Dr. Peter Bieri to examine and evaluate Ms. Morgan. Dr. Bieri determined that Ms. Morgan had a nine percent whole body functional impairment as a result of the impairment to her left lower extremity and back. The doctor attributed that impairment to the September 1997 accident. The Judge adopted Dr. Bieri's conclusions of functional impairment and the Appeals Board affirms that finding.

The Board is mindful that Dr. Hinkin did not evaluate Ms. Morgan's back and that Dr. Edward J. Prostic determined that she had an 11 percent whole body functional impairment for her low back and left ankle. Nonetheless, the Appeals Board is persuaded by Dr. Bieri's expert medical opinions and conclusions. Therefore, the Appeals Board also finds and concludes that Ms. Morgan has sustained a nine percent whole body functional impairment as a result of the September 22, 1997 accident.

CONCLUSIONS OF LAW

1. The Award should be affirmed.
2. Ms. Morgan is not claiming any permanent partial general disability greater than her functional impairment rating. As indicated above, Ms. Morgan has sustained a nine percent whole body functional impairment as a direct result of her September 1997 accident. Therefore, her permanent partial general disability is nine percent.¹
3. The Workers Compensation Act provides that an award of disability benefits is to be reduced by the amount of preexisting impairment.² But that provision is not applicable to this claim as the minor back symptoms that Ms. Morgan experienced before the September 1997 accident did not restrict or limit her in any discernible manner. Therefore, the Appeals Board concludes that Ms. Morgan was not impaired before the 1997 accident.
4. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated May 10, 1999.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Scott M. Gates, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

¹ See K.S.A. 1997 Supp. 44-510e.

² K.S.A. 1997 Supp. 44-501(c).